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October 20, 2021  
*VIA ECF AND EMAIL*

Hon. Michael M. Baylson, U.S. District Judge  
3810 United States Courthouse  
601 Market Street, Philadelphia, PA 19106

**Re: *Lontex Corporation v. NIKE, Inc., Case No. 18-cv-5623:***  
**Request to Preclude or Limit Testimony of David Drews as Part of Liability Phase**

Dear Judge Baylson:

While recognizing that this Court previously ruled that Plaintiff's expert David Drews may testify in the liability phase as to "sales volume," Defendant NIKE, Inc. ("NIKE") respectfully raises objections to Mr. Drews' testimony in light of the newly created exhibits proffered for use with Mr. Drews. Yesterday, Lontex presented NIKE with new, previously undisclosed charts and calculations, which Lontex states it will introduce with Mr. Drews on Thursday, October 21 as part of the liability phase of this trial. NIKE respectfully requests that the Court allow counsel to *voir dire* Mr. Drews outside the presence of the jury as NIKE does not believe Mr. Drews can reliably establish the sales volume he proffers in Plaintiff's summaries.<sup>1</sup> These new exhibits suffer from four problems that undermine the reliability of Mr. Drews' testimony<sup>2</sup>:

*First*, Mr. Drews' revised exhibit (PX0029, attached hereto as Ex. A) contains a "total units sales" figure of 6,706,909. This number includes sales that were barred by this Court's September 2, 2021 Order (ECF Nos. 303 & 304), which held that "Nike may not be held liable for uses of 'cool' and 'compression' separated by other words or numbers, or abbreviated." (ECF No. 303, at 5). Contravening this Order, PX0029 includes *all* the sales of the *original* products that Lontex alleged were infringing (which it calls the "NIKE accused products") without removing sales of

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<sup>1</sup> NIKE notes that, in the event Mr. Drews is not permitted to testify as part of liability, Lontex's branding expert witness, Jeffrey Parkhurst, would lack a factual basis on which to submit his own testimony because his opinions merely adopted Mr. Drews' calculation of the total number of units sold. (ECF No. 190-6, Parkhurst Report ¶ 89 & n.84; *see* Parkhurst Dep. Tr. 96:11–16.)

<sup>2</sup> NIKE raised some of these concerns in its Trial Memorandum (ECF No. 329 at 11–16), but now possesses additional detail regarding the absence of relevant testimony Mr. Drews can offer related to liability.



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style numbers where “cool” was separated from “compression” or variations of the same, *e.g.*, Style 724354: “Cool ½ Sleeve Comp Top.”<sup>3</sup>

*Second*, the numbers provided on PX0029 are unsupported by any explanation as to how they tie to NIKE’s produced data. Our efforts to verify these numbers with comparison to NIKE sales spreadsheets do not match the numbers on Mr. Drews’s chart. The chart lacks any citation, and we have received no explanation in Mr. Drews’s expert reports or otherwise for how these new numbers were calculated.

*Third*, this Court’s Order conditionally permitted the testimony of Mr. Drews provided that “the experts, when testifying in the liability phase, **cannot make any assumptions that Nike is liable**.” (ECF No. 303 at 10). But in calculating the total sales for each product, Mr. Drews testified that his entire analysis **assumed that liability would be established** and **assumed that every sale in a named style number** was made in connection with an infringing use of “cool compression.” Drews Depo. Tr. 84:4–16; 136:23–137:4. Mr. Drews, moreover, testified that he conducted “**no independent verification on any particular sale**” to confirm that the sale was made in connection with the alleged use of cool compression. Drews Depo. Tr. 79:4–12. He has made no distinction, moreover, among sales volumes by channel (*i.e.*, NIKE’s own retail stores, NIKE’s online sales, NIKE catalog sales, or NIKE sales to third-party retailers), and he has not adjusted his totals where the only evidence of the use of “cool compression” exists merely in a single channel. And Mr. Drews purports to quantify total “NIKE cool compression” sales over a four-year period from 2015 through 2018 — although the chart states no date limits on its face — even where the evidence of any use of “cool compression” for a particular product is date-limited.

*Finally*, Mr. Drews’s sales volume calculations purport to total NIKE’s sales of its products for a particular style number. That is fact testimony, not expert testimony (and given the uncertainties about the calculations, may not even constitute accurate fact testimony). As explained in NIKE’s October 14 Trial Brief (ECF No. 329 at 11–16), Mr. Drews has no personal knowledge of NIKE’s or any third-party retailers’ sales figures and has no basis to explain their internal sales data collection and compilation processes.

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<sup>3</sup> Inexplicably, Mr. Drews’ total sales volume number has also increased between Lontex’s production of PX0020 (which Lontex provided to NIKE on September 28, 2021, attached hereto as Ex. B), which stated that there were 6,705,529 total Nike Accused Products sold, while PX0029 (which Lontex provided to NIKE on October 19, 2021) stated that there were 6,706,909 “Nike Accused Products” sold. Plaintiff has offered no explanation for this discrepancy.



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In light of these concerns, NIKE renews its objection to Mr. Drews's testimony on the sales volumes, objects to presentation of sales volumes that includes data for products excluded by this Court's prior ruling, and respectfully requests that Mr. Drews be subject to voir dire to ascertain the reliability of the remainder of his sales volume report.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "JHS".

Ilana H. Eisenstein  
*Counsel for NIKE, Inc.*

cc: Counsel of Record via ECF & E-Mail

## **EXHIBIT A – PX0029**

**Lontex Corporation v. Nike, Inc.**  
**By Style Summary - Parts One & Two**  
**Unit Sales for Select SKUs**

By Style Summary - Part One	Unit Sales	Percent of Total
703084	1,472,570	22.0%
703086	627,460	9.4%
703088	282,560	4.2%
703094	410,644	6.1%
703098	1,167,938	17.4%
<b>Total for Select SKUs - Part One</b>	<b>3,961,172</b>	<b>59.1%</b>
By Style Summary - Part Two	Unit Sales	Percent of Total
703096	51,498	0.8%
719903	86,123	1.3%
726460	44,659	0.7%
726462	60,497	0.9%
726464	185,858	2.8%
728047	60,890	0.9%
729269	5,128	0.1%
828642	24,638	0.4%
<b>Total for Select SKUs - Part Two</b>	<b>494,653</b>	<b>7.4%</b>
<b>Total Units Sales - Nike Accused Products</b>	<b>6,706,909</b>	<b>100%</b>

## **EXHIBIT B – PX0020**

**Lontex Corporation v. Nike, Inc.**  
**Cool Compression Product Sales by State - Units**  
**Lontex, Nike and Nike Retailer Customers**

State	Lontex 2006 - 2014	Lontex 2015 - 2019	Nike Wholesale	Nike Retail	Non-Nike Retail
	Units	Units	Units	Units	Units
"Not Assigned"	310	264	1,117,560	0	1,117,560
Alabama	16	15	19,008	12,449	6,559
Alaska	15	0	901	0	901
American Samoa	0	0	155	0	155
Arizona	434	198	259,253	42,993	216,260
Arkansas	483	143	12,762	8,019	4,743
California	1,086	189	790,442	248,960	541,482
Colorado	182	35	43,511	26,131	17,380
Connecticut	68	7	34,358	8,780	25,578
Delaware	494	179	5,068	8,119	(3,051)
District of Columbia	111	3	7,323	5,142	2,181
Florida	1,567	522	272,241	194,299	77,942
Georgia	185	103	345,649	38,468	307,181
Guam	0	0	849	0	849
Hawaii	6	2	5,578	0	5,578
Idaho	9	1	14,188	9,917	4,271
Illinois	2,718	474	77,445	34,077	43,368
Indiana	45	132	438,042	9,833	428,209
Iowa	24	20	47,277	12,704	34,573
Kansas	34	6	32,275	7,139	25,136
Kentucky	14	11	62,828	10,217	52,611
Louisiana	139	15	24,453	11,797	12,656
Maine	15	0	12,051	9,399	2,652
Maryland	873	146	48,625	24,867	23,758

**Lontex Corporation v. Nike, Inc.**  
**Cool Compression Product Sales by State - Units**  
**Lontex, Nike and Nike Retailer Customers**

State	Lontex 2006 - 2014	Lontex 2015 - 2019	Nike Wholesale	Nike Retail	Non-Nike Retail
	Units	Units	Units	Units	Units
Massachusetts	215	96	63,012	25,183	37,829
Michigan	160	104	115,126	25,587	89,539
Military America	0	0	78	0	78
Military Europe	3	1	13,636	0	13,636
Military Pacific	2	0	13,279	0	13,279
Minnesota	102	39	60,539	27,569	32,970
Mississippi	11	0	18,873	13,223	5,650
Missouri	510	137	42,314	17,700	24,614
Montana	25	7	10,584	0	10,584
N Mariana Islands	0	0	251	0	251
Nebraska	3	0	30,966	7,363	23,603
Nevada	108	25	64,943	52,680	12,263
New Hampshire	27	4	21,586	13,959	7,627
New Jersey	2,061	224	164,453	44,711	119,742
New Mexico	49	7	5,700	1,055	4,645
New York	536	142	271,763	63,628	208,135
North Carolina	136	69	65,591	23,612	41,979
North Dakota	4	1	17,428	0	17,428
Ohio	1,056	110	93,922	30,894	63,028
Oklahoma	33	5	24,006	6,533	17,473
Oregon	36	1	324,413	311,628	12,785
Pennsylvania	2,304	880	634,148	35,183	598,965
Puerto Rico	1	0	11,719	9,673	2,046
Rhode Island	4	0	3,319	0	3,319

**Lontex Corporation v. Nike, Inc.**  
**Cool Compression Product Sales by State - Units**  
**Lontex, Nike and Nike Retailer Customers**

State	Lontex 2006 - 2014	Lontex 2015 - 2019	Nike Wholesale	Nike Retail	Non-Nike Retail
	Units	Units	Units	Units	Units
South Carolina	42	29	31,463	19,518	11,945
South Dakota	2	0	12,745	0	12,745
Tennessee	1,236	47	223,371	191,658	31,713
Texas	1,719	1,003	338,147	110,232	227,915
Utah	32	4	46,901	27,878	19,023
Vermont	5	1	1,760	0	1,760
Virginia	475	62	68,588	24,355	44,233
Washington	151	22	61,142	36,211	24,931
West Virginia	33	5	20,661	0	20,661
Wisconsin	212	52	156,097	23,966	132,131
Wyoming	11	11	1,163	0	1,163
<b>Totals:</b>	<b>20,132</b>	<b>5,553</b>	<b>6,705,529</b>	<b>1,867,309</b>	<b>4,838,220</b>

Sources: NIKE-00044256, 45845; LTX\_EDPA\_00000867, 905, 24506, 24507.